

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BOONE COUNTY WATER AND SEWER DISTRICT,)	
SANITATION DISTRICT NO. 1 OF CAMPBELL AND)	
KENTON COUNTIES, DWIGHT BRAY, BILL C.)	
SHEHAN, SR., ROBERT C. BELL, RICHARD)	
CRISP, AND R. C. DURR)	
)	
)	
)	CASE NO. 93-084
)	
ALLEGED VIOLATION OF KRS 278.020(1))	

O R D E R

Boone County Water and Sewer District ("Boone District") and Sanitation District No. 1 of Campbell and Kenton Counties ("Sanitation District No. 1") have moved for clarification of the alleged violations stated in the Commission's Order of March 15, 1993. Finding that our Order of March 15, 1993 requires no clarification, the motions constitute an improper request for production of documents, and the movants already possess the information sought, we deny the motions.

Although each movant characterizes its motion as a "Motion for Clarification", these motions are essentially requests for discovery. They seek, inter alia, production of contracts between the movants for the construction of certain sewer facilities, the date that movants began construction of these facilities and "all facts and/or evidence relied upon by the Public Service Commission" to reach certain conclusions. Movants contend that such

information is necessary to prepare adequately for the scheduled hearing in this matter.

The Order of March 15, 1993 adequately states the basis for the Commission's finding that prima facie evidence exists that a violation of KRS 278.020(1) had occurred. It refers to all documents and information upon which the Commission relied in reaching its decision.

For the movants' benefit, we summarized those facts. On December 3, 1993, Boone District petitioned for a Certificate of Public Convenience and Necessity to construct sanitary sewer facilities. Boone District included in its petition diagrams of the proposed facilities, their construction specifications and some general information about the proposed facilities' financing. It also stated that the proposed facilities were related to a contract which it and Sanitation District No. 1 executed in September 1991.¹

When the Commission subsequently requested the submission of additional documents to obtain Boone District's compliance with the Commission's rules of procedure, Boone District replied:

The project, which was begun in accordance with the Agreement with Sanitation District No. 1, commenced upon Commission approval of the contract. . . .

Boone believes that the information submitted is sufficient to justify the issuance of a certificate of convenience and necessity. The Commission has previously found that the contract and the related construction and indebtedness is in the public interest. Sanitation District No. 1, pursuant to the terms of the agreement has commenced construction. Boone, pursuant to the agreement and

¹ This Agreement is attached to the Boone District's Application as Exhibit 1.

the Commission's approval of it, now has an obligation to Sanitation District No. 1. If the Commission had additional questions about the financing and the obligations being incurred by Boone, it should have raised those questions in Case No. 92-245. Now that the project is underway and both Boone and Sanitation District have relied on the prior approval of the agreement and its terms, any revision to the construction or the financing may place Boone in violation of the agreement.

Boone District's Response to Commission's Order of 12/14/92 at 2-3 (emphasis added).

In our Order of March 15, 1993 which initiated this proceeding, this Commission specifically noted Boone District's Response and identified it as the impetus for these proceedings. In its petition, Boone District clearly identified the facilities at issue, noted that no certificate had yet been obtained for them, and that Sanitation District No. 1 had commenced construction of these facilities. In light of these facts, this Commission fails to understand why further clarification is required.

Assuming arguendo that clarification were required, movants' requests for the production of certain documents and information constitutes an improper intrusion into this Commission's deliberative process. "[T]he commission, like a court, acts and speaks only through its written orders." Union Light, Heat & Power Co. v. Pub. Serv. Comm'n, Ky., 271 S.W.2d 361, 365 (1954). Movants seek to go behind the March 15, 1993 Order to probe the Commission's mental processes. Such inquiry is impermissible.

In United States v. Morgan, 313 U.S. 409 (1941), a litigant challenging an administrative action of the Secretary of Agriculture sought discovery of his deliberative process.

Reversing a lower court decision permitting such discovery, the Supreme Court ruled:

[T]he short of the business is that the Secretary should never have been subject to this examination. The proceeding before the Secretary has the "quality resembling that of a judicial proceeding." Such an examination of a judge would be destructive of judicial responsibility. . . . Just as a judge cannot be subject to such a scrutiny, so the integrity of the administrative process must be equally respected.

Morgan at 422 (citations omitted). This prohibition against discovery of an administrative agency's decision-making process has been consistently upheld. See, e.g., Montrose Chemical Corporation of California v. Train, 491 F.2d 63 (D.C. Cir. 1974).

Moreover, most, if not all, of the documents and information sought are already in the movants' possession. Boone District provided all documents and information upon which the Commission based its decision. At least some of these materials were provided to Boone District by the Sanitation District No. 1.² A sizable portion of the requested documents, moreover, are contained in public records and readily accessible to the movants.

While this Commission finds that good cause does not exist to grant the movants' motions, we believe that movants should be afforded notice of the witnesses which will be called to testify at the scheduled hearing and of the documents which will be presented there. Accordingly, we have instructed Commission Staff to provide

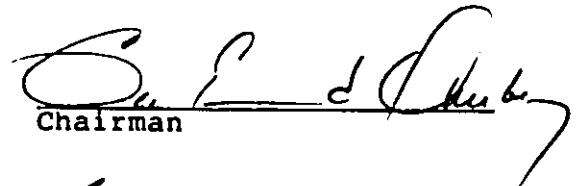
² To ensure that Sanitation District No. 1 has the documents referenced in the March 15, 1993 Order, the Commission has instructed its Staff to furnish a copy of these documents to Sanitation District No. 1.

such information to movants within a reasonable period before the scheduled hearing.

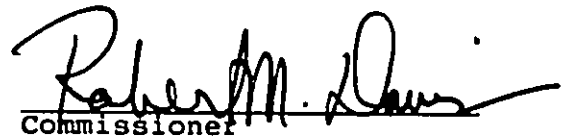
IT IS THEREFORE ORDERED that Boone District's and Sanitation District No. 1's motions for clarification are denied.

Done at Frankfort, Kentucky, this 16th day of August, 1993.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director